Supreme Court, U.S.
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No. 97-1864

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

LOUIS CANTOR,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I.

In its brief in opposition to Cantor's petition for a writ of certiorari ("Br. Opp."), the government contends that Cantor "fails to identify any factual distinction of constitutional significance" between this case and Salinas v. United States, ___ U.S. ___, 118 S. Ct. 469 (1997). Br. Opp. 6. That contention cannot be taken seriously. See Pet. 10-11. Otherwise, the government's brief raises no new points with respect to the first question presented, concerning the constitutionality of 18 U.S.C. §666 as applied in this case. This reply brief therefore will not address that issue further. U.S. Sup. Ct. Rule 15.6.

II.

The government's brief in opposition makes clear that the second question presented, concerning the meaning and applicability of 18 U.S.C. §666(c), is a classic certiorari-worthy issue. The government acknowledges that the issue is unsettled and the circuits are split on it. Br. Opp. 7 & n.1. Moreover, the government does not dispute that the issue is important enough for review by the Court, but contends that the issue should not be reviewed in this case because Cantor failed to make the argument "in the form in which it is now asserted." Br. Opp. 7-8. The government is wrong.

The government argues that subsection (c) "applies only to the bribery (and gratuity) component of the statute," meaning that the exemption applies only when the payment constituting the bribe or gratuity is bona fide compensation,

fees or expenses. Br. Opp. 7 n.1. The government made the same argument below (Gov't C.A. Br. 59-62), and the Second Circuit implicitly accepted it. The Sixth Circuit, however, has rejected an identical argument (United States v. Mills, 140 F.3d 630, 632-33 (6th Cir. 1998)), creating a conflict between the circuits. See U.S. Sup. Ct. Rule 10(a). Moreover, the government takes issue with the Sixth Circuit's interpretation of subsection (c) in Mills (Br. Opp. 7 & n.1), and therefore would no doubt agree that the interpretation of subsection (c) is an issue that "should be[] settled by this Court." U.S. Sup. Ct. Rule 10(c).

Cantor raised this issue below when he argued that where, as here, the underlying transaction (i.e., the objective of an alleged payoff) is bona fide compensation, fees or expenses, the statutory element of "corrupt" intent is negated.[1] The government now claims that Cantor is making an "entirely different" argument in his petition, i.e., that subsection (c) "completely exempts from the coverage of Section 666 a corrupt bribe made for the purpose of obtaining legitimately owed fees or compensation." Br. Opp. 6-7. Cantor's argument, however, has always been that his

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1. Cantor's principal brief contained the following argument: "Cantor could not have acted 'corruptly' within the meaning of the statute, at least as to Manshul and Caristo, because his conduct involved bona fide 'compensation' within the meaning of §666(c), i.e., the retainages due his clients. The district court's conclusory assertion that the contract balances and retainages owed to Cantor's clients are 'not similar to wages or salary' is unpersuasive since subsection (c) also includes 'compensation,' and the retainages here were simply deferred compensation. In fact, subsection (c) also includes 'fees,' i.e., contractual compensation like retainages." Pet. C.A. Br. 43-44 (footnote omitted).

conviction must be reversed because the government failed to prove that what he was attempting to achieve for his clients did not constitute "bona fide" compensation or expenses within the meaning of subsection (c).

Cantor also argued in the court of appeals that:

> Because all parts of a statute must be given meaning, and because the literal terms of subsection (c) exempt Cantor's conduct from prosecution at least as to the Manshul and Caristo transactions where compensation in the form of retainages or contract balances were at issue, subsection (c) provides an independent ground for reversal as to Counts One through Four, wholly apart from the support it gives to Cantor's argument that he lacked corrupt intent. Cf. United States v. Harloff, 815 F. Supp. 618 (W.D.N.Y. 1993).

Pet. C.A. Br. 44 n.45.

Furthermore, when the government argued below that the language of subsection (c) applies only to payments intended as a bribe or reward, and not to the underlying transaction or purpose for which the payments were made (Gov't C.A. Br. 59-62), Cantor replied that

> the government does not, and cannot, dispute that the money Cantor's clients sought to obtain by paying Rosenblum constituted "bona fide . . . compensation" within the meaning of 18 U.S.C. §666(c). The government thereby

> effectively concedes Cantor's argument that §666(c) requires reversal.
>
> The government contends that subsection (c) applies only to the amount paid as a bribe, and not to the benefit to be obtained through payment of the bribe. Govt. Br. 60. The plain language of subsection (c) contains no such limitation, however, and the government cites no authority supporting its reading of the statute.

Pet. C.A. Reply Br. 12-13. In short, the question presented for this Court's review was presented to the court of appeals, which had ample opportunity to consider it.

The government also addresses the merits of Cantor's position on this issue. The government contends that if the statute means what it says, and excludes from its reach payments made to influence or reward a corrupt public official in order to obtain what the payor is legitimately entitled to, "anomalous" results would follow. Br. Opp. 7. The Mills court rejected the government's concerns, observing that although the acceptance of bribes by public officials to give out government jobs is "reprehensible,"

> [i]n its wisdom . . . Congress has apparently determined that all such instances of bribery do not merit the attention of the federal courts. Instead, many such transgressions are best left to state judicial systems for prosecution, conviction, and punishment.

140 F.3d at 634.

The Sixth Circuit's inclination to leave many local bribery transactions for prosecution by the States finds support in this Court's recent federalism jurisprudence. See Salinas, 118 S. Ct. at 474-75 ("absent a clear indication of Congress' intent to change the balance, the proper course [is] to adopt a construction [of a statute] which maintains the existing balance" of federal and state powers); United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) ("When Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction'") (quoting United States v. Bass, 404 U.S. 336, 349 (1971)).

Despite the limitations it would read into the language of subsection (c), the government concedes that the compensation sought by Cantor's clients in this case was "bona fide," and "paid . . . in the usual course of business." 18 U.S.C. §666(c).[2] Because the government's brief makes clear that the meaning of subsection (c) is an issue worthy of this Court's review, and because the exact issue Cantor presents for review was plainly raised in the court of appeals, the writ of certiorari should be granted.

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2. The government admits that the retainage payments were "owed" to Cantor's clients by the Board of Education and that "[t]here appears to have been a pattern of improper withholding of the retainage payments by the BOE." Br. Opp. 2. Cantor's clients made the alleged payoffs in response to the corrupt BOE official's threat to continue such improper withholding of the funds the clients were owed, which, as Judge Stanton found, amounted to extortion, a fact that would have provided Cantor with a complete defense to a bribery charge under New York law. Pet. App. B18.

CONCLUSION

For the foregoing reasons and for the reasons stated in Cantor's petition, the writ of certiorari should be granted.

Respectfully submitted,

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